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INTRODUCTION: FROM THE OLD TO THE NEW SYNTHESIS

In many ways the basic structure of constitutional law circa 2006—which features a strong national government of unlimited authority and weak protection of economic liberties and property rights—derives from the New Deal synthesis circa 1937. That synthesis insists that an extensive national role in the regulation of economic affairs is an indispensable tool for social progress. For the better part of fifty years that synthesis dominated both judicial and academic writing on American federalism. One of the great transformations that took place during the critical Chief Justiceship of William H. Rehnquist involved a systematic and prolonged challenge of that worldview. I have little doubt that many contributors to this Symposium will be critical of

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the efforts of Chief Justice Rehnquist and Justice O'Connor to "turn back the clock" on this critical question of federalism. My thesis is the precise opposite. I praise the two Justices for breaking the intellectual logjam on so critical an issue. Yet, at the same time, I take the view that on many key questions of federalism they should have pushed harder and moved farther than they ultimately did. I defend that thesis with respect to three critical areas of law: the scope of the Commerce Clause, dual sovereignty and the Tenth Amendment, and the doctrine of sovereign immunity.

To set the stage ever so briefly, during the first third of the twentieth century, members of the American left wing—then represented by the Progressive movement—were outsiders to American constitutional law, looking in.[1] Its intellectual leaders, such as Louis Brandeis and Felix Frankfurter, railed against the Old Court for its retrograde resistance to modern social legislation, chiefly (but not exclusively) as it related to big business and the labor markets.[2] Their intellectual and political campaign met with continuing success, culminating in a major shift in judicial worldview during the 1936-1937 Term on two recurrent and interlocking constitutional issues: the structural questions of federalism and the protection of economic liberties and private property. After the campaign's brief hiatus during the Vinson Court (1946-1953), the Warren Court (1953-1969) did much to consolidate and expand the early New Deal victories. Its work was carried forward in relative quiet through much of the Burger Court (1969-1986)—a Court which proved more innovative on other fronts.[3] The Rehnquist Court (1986-2005), which has now drawn to a close, made inroads on the New Deal synthesis on both federalism and property rights. On the federalism side, it helped make debate over the scope of the commerce power a live issue, and it sought to breathe new life into the Tenth Amendment and the doctrine of sovereign immunity. On questions of property rights, Chief Justice Rehnquist, Justice O'Connor, and other members of the conservative bloc questioned the view that the Takings Clause of the Constitution places no barriers to the ability of either Congress or the states to impose whatever forms of regulation on land use development that public officials see fit.[4]

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1. For my defense of the "old" Supreme Court targeted by the Progressives, see RICHARD A. EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION (2006). In this short book I outline my historical and intellectual objections to the New Deal movement, and I will not seek to defend anew those substantive conclusions here.

2. *See, e.g.*, LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY, AND HOW THE BANKERS USE IT (1914); FELIX FRANKFURTER & NATHAN GREENE, THE LABOR INJUNCTION (1930).

3. The most notable decision of the early Burger Court is, of course, *Roe v. Wade*, 410 U.S. 113 (1973). But this decision was joined by other expansive blockbusters such as *Reed v. Reed*, 404 U.S. 71 (1971), *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and *Goldberg v. Kelly*, 397 U.S. 254 (1970).

4. *See, e.g.*, Dolan v. City of Tigard, 512 U.S. 687 (1994); Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987). The movement on property rights has in many ways been as incomplete as the movement on the

In this Article I shall only address the federalism issues, but my silence on economic liberties issues should not be read as agreement with the 1937 revolution or with the Court's subsequent treatment of property rights.

It is important to recall that the great achievement of the Progressives and their followers was to sweep away all constitutional obstacles to the implementation of their political and social agenda—an agenda which championed comprehensive regulation of business and property at both the federal and state levels. One key component of the Progressive campaign involved an expansive reading of the Commerce Clause—"The Congress shall have Power . . . to regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes."[5] The Commerce Clause was defined by the Court's decisions in two key cases: *National Labor Relations Board v. Jones & Laughlin Steel Corp.*,[6] which upheld the National Labor Relations Act as it applied to local businesses (i.e., those outside the fields of transportation and communication); and *Wickard v. Filburn*,[7] which ratified the new constitutional order by sustaining the Agricultural Adjustment Act insofar as it applied to household consumption of grain in violation of a national quota system.

The conventional wisdom that emerged from these cases was that it took only a bit of verbal ingenuity to insulate any congressional legislation from challenges that the legislation fell outside Congress's power under the Commerce Clause. Congress—if it chose—was free to regulate any local activity in order to prevent the destructive competition that it believed would otherwise take place across state lines. The Fair Labor Standards Act (FLSA), which imposed federal minimum wage and maximum hour laws, was sustained in large measure in the belief that enlightened federal regulation was indispensable to countering the inherent abuses in competitive labor markets.[8]

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federalism questions. Contrast, for example, *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), with *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002). For my views on this incomplete movement, see Richard A. Epstein, *The Ebbs and Flows in Takings Law: Reflections on the* Lake Tahoe *Case*, 1 CATO SUP. CT. REV. 5 (2002).

5. U.S. CONST. art. I, § 8.

6. 301 U.S. 1 (1937).

7. 317 U.S. 111 (1942).

8. *See* United States v. Darby, 312 U.S. 100 (1941). *Darby* upheld the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1938), against Commerce Clause challenges and overruled *Hammer v. Dagenhart*, 247 U.S. 251 (1918). The legislative findings make it clear that Congress's desire to overturn *Hammer* rested on the congressional finding that linked the broad scope of the commerce power to the supposedly vulnerable state of workers in national markets:

> [T]he existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of

Apart from the Bill of Rights, the only limits on national power that remained were prudential, not legal.[9]

This increased scope of federal power is well illustrated by the judicial response to the Civil Rights Act of 1964, passed at the height of the Warren Court. Quite simply, the Civil Rights Act of 1964 could not have been sustained in anything like its original form if matters internal to the states were outside the scope of Congress's power under the Commerce Clause.[10] But cases like *Jones & Laughlin Steel Corp.* and *Wickard* transformed the constitutional landscape, so it was no surprise that the Commerce Clause challenges to the 1964 Act were blown aside in the litigation that followed its passage.[11]

The march toward increased federal power was not, of course, limited to the federal regulation of private, local activities. It also extended to the federal regulation of ongoing administrative and business activities of the states, notwithstanding claims that as independent and coequal sovereigns, states could not be subject to federal regulations that interfered with the discharge of their governmental functions.[12] The new Commerce Clause jurisprudence not only played havoc with earlier views on enumerated powers but also removed the protection of state sovereignty embodied in the Tenth Amendment.[13] In subsequent years, the Supreme Court has had to face the question of whether an expansive Commerce Clause sweeps away all obstacles to the assertion of

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competition in commerce . . . .

Darby, 312 U.S. at 110 (citing 29 U.S.C. § 202(a) (1938)). It seems clear that Chief Justice Stone also accepted that overall worldview.

9. The leading contemporary academic articles on this subject were written by Robert Stern. *See* Robert L. Stern, *That Commerce Which Concerns More States than One*, 47 HARV. L. REV. 1335 (1934); Robert L. Stern, *The Commerce Clause and the National Economy, 1933-1946*, 59 HARV. L. REV. 645 (1946). As one of the academics who has defended the pre-1937 constitutional order, I shall not review in detail my disagreements with the New Deal synthesis. For a fuller elaboration of that position, see Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987). For an immediate reaction to *United States v. Lopez*, 514 U.S. 549 (1995), see Richard A. Epstein, *Constitutional Faith and the Commerce Clause*, 71 NOTRE DAME L. REV. 167 (1996). For criticism of the view that changed circumstances require some reinvention of the Commerce Clause, see Richard A. Epstein, *Fidelity Without Translation*, 1 GREEN BAG 2d 21 (1997).

10. *See* United States v. E.C. Knight, 156 U.S. 1 (1895) (rejecting an as-applied challenge to the application of the Sherman Act to manufacturing).

11. *See, e.g.*, Katzenbach v. McClung, 379 U.S. 294 (1964) (rejecting Commerce Clause challenge); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241-61, (1964) (rejecting Commerce Clause and Takings Clause challenges). Any effort to base the Civil Rights Act not on the Commerce Clause but on the Fourteenth Amendment faced a serious challenge under the *Civil Rights Cases*, 109 U.S. 3 (1883), which held that the Amendment applied only to state action.

12. *See, e.g.*, Maryland v. Wirtz, 392 U.S. 183 (1968) (upholding federal minimum wage requirements as applied to employees of state and local hospitals and schools).

13. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

federal power in connection with the two issues discussed in Parts II and III—the scope of reserved powers under the Tenth Amendment and the extent to which any grant of Congressional power under Article I, Section 8 is sufficient to overcome the traditional doctrine of state sovereign immunity.

There is little question then that by the end of the Warren Court the basic dominance of federal over state power had solidified. The rock-solid nature of this synthesis was attributable in large measure to the utter absence of any serious intellectual counterforces. As a matter of dominant political philosophy, the governing elites within and near the legal profession were serenely content with the status quo. Their model of governance involved the cooperative interaction of state and market. They were confident that the federal government had the political wisdom to decide how far the state should go and why.[14] The great transformation wrought in part by Chief Justice Rehnquist and Justice O'Connor—and, of course, in different measures by Justices Scalia, Kennedy, and Thomas—was to upset that cozy consensus by turning constitutional law on these issues into a dialogue in which the forces backing the New Deal synthesis now met a considered intellectual opposition.

The achievement of the Rehnquist/O'Connor alliance is significant because neither Justice showed any affection for the large-scale speculation that holds such great appeal to academic writers but which is death to any Supreme Court nominee who is promptly tagged with having an ideological agenda. Rehnquist's and O'Connor's willingness first to question and then to resist the dominant political doctrines of their time rested on a keen sense of constitutional incrementalism—a characteristic of common law decisions that often redirect established legal authority without waging a frontal assault on established doctrine.[15] It is only when we put the full picture together that we see that several increments count as real steps, so the constitutional landscape is quite different now than it was before they arrived—then-Justice Rehnquist in 1972 and Justice O'Connor in 1981. Working within a set of realistic institutional constraints, each worked to reshape the dominant doctrine. It is easy to point out the differences between them: Justice O'Connor was happier to balance, while Chief Justice Rehnquist was more inclined to opt for legal rules than general standards. Justice O'Connor was closer to the center; Justice Rehnquist—especially before he became Chief Justice—was more rigorously conservative. But these differences are less significant than their shared uneasiness with (which is not hostility to) the legacy of the New Deal and the Warren Court.

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14. Perhaps the leading two works of this sort, written in successive generations, are ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (1962) and JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980). The confidence in the New Deal paradigm is also reflected in two of the most influential casebooks of the present generation, KATHLEEN SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW (15th ed. 2004) and GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW (4th ed. 2001).

15. *See, e.g.*, EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING (1949).

There is, of course, much to praise in both the Rehnquist and O'Connor styles of incrementalism—at least if one agrees with their overall direction, as I do. But by the same token, it is easy to conclude that at times their greatest strength was also their greatest weakness. Incremental changes work in two dimensions. At the margins, they often shift the direction of the law, thereby opening up an earnest dialogue about how far the changes should go and why. But for both Rehnquist and O'Connor, the downside of incrementalism comes on many occasions from their unwillingness to stake out clear positions that are capable of consistent application over the broad run of cases. Thus their decisions tend in many instances to reveal a major disconnect between the bold basic principles to which they appeal and the more guarded legal rules that they fashion in order to implement them.

The simplest way to make the general point is as follows. There is no question that Rehnquist and O'Connor had some misgivings with the New Deal synthesis that dominated through the Burger Court. Yet, by the same token, they did not have any uniform commitment to reintroduce into current law the principles that the pre-1937 Court embraced regarding federalism, especially on the basic question of the proper reading of the Commerce Clause. One consequence of their ambivalence is that their decisions have spawned a tremendous literature assessing the overall impact of their work. But the battles that they have chosen to fight in recent cases do not seek to undo the fundamental 1937 reforms. Rather, they really seek to decide only whether we should undo five or ten percent of the New Deal synthesis. As a result of their framing of their positions as an incremental adjustment rather than as a frontal assault on the New Deal synthesis, two clear if unintended consequences emerge. First, doctrinal coherence is a casualty of their approach. The lines that Rehnquist and O'Connor draw may have had the modest virtue of allowing one to decide which cases fall on which side. But a principled line has to do more than sort the cases. It has to be congruent with a textual or structural theory that explains why the line is drawn in one place rather than another. The disconnect between broad principle and modest rule frustrates that interpretive ideal. Second, the most important institutional consequence of their joint handiwork (and that of the so-called conservative bloc) was to *strengthen* the very core of the post-New Deal synthesis that they subjected to marginal attack. Stated otherwise, their successful attempt to lop off a few branches from the top of the modern doctrinal tree has paradoxically made it more difficult to chop down the whole tree. In the effort to make a modest incursion on the New Deal and Warren Court Commerce Clause doctrine, Rehnquist and O'Connor ratified the expansive core of *Wickard v. Filburn*.

The hard question is how to evaluate this shift. In my view, the bottom line is that, regrettably, the New Deal consensus is more cohesive today than it has ever been. For those who are happy with the earlier consensus, there is some comfort—if not jubilation—in saying that the conservative counterrevolution has run its course. But for those of us who think that the New Deal revolution

and its subsequent elaboration represent a mistaken retreat from sound constitutional principle, the ultimate verdict is harder to reach. The modest retrenchment has come at the price of indecisive and often incoherent doctrinal developments, which inevitably make it still more difficult to reexamine current law as a matter of first principle. Whether this analytical confusion is justified by the modest improvements it creates, I leave for others to decide. My task is to show that when faced with the collision between classical constitutional principles and their New Deal departures, Chief Justice Rehnquist and Justice O'Connor preferred to blink rather than to fight. The purpose of this Article is to evaluate three major strands of work that Rehnquist and O'Connor have contributed to the law of federalism. The first concerns the basic scope of the Commerce Clause. The second concerns the interaction between the Commerce Clause and the Tenth Amendment. The last concerns the related problem of the role of the Commerce Clause and the Fourteenth Amendment in connection with the doctrine of sovereign immunity. A brief conclusion follows.

I. THE BASIC SCOPE OF THE COMMERCE CLAUSE

One of the great shifts in American constitutional law has been the recent revival of an active jurisprudence regarding the reach of the Commerce Clause. When the Supreme Court granted certiorari in *United States v. Lopez*,[16] I was asked whether it would be worthwhile to write an amicus brief that supported the constitutional challenge to the Gun-Free Schools Zone Act of 1990. I responded, "Not really, given that *Wickard* and its ilk are sure to lead to a reversal of this case" (in which the Eighth Circuit had declared the law unconstitutional). But that prophecy proved profoundly wrong when Chief Justice Rehnquist struck down the law, which had made it illegal for "any individual knowingly to possess a firearm at a place that the individual knows . . . is a school zone."[17] To the unpracticed eye, the most obvious question is why anyone would think that this statute had anything to do with commerce among the several states, any more than it had to do with commerce with foreign nations or the Indian tribes. Indeed, it took considerable effort to explain the case to nonlawyers because of their naïve view that commerce among the several states could not cover the intensely local activity of gun possession which was, of course, heavily regulated by the Texas legislature.

This tension between ordinary language and received constitutional wisdom only clouds rational inquiry. It was therefore refreshing for Chief Justice Rehnquist to announce boldly that he would start with an enunciation of

16. 514 U.S. 549 (1995).

17. Gun-Free Schools Zone Act of 1990, Pub. L. No. 101-647, § 1702, 104 Stat. 4844 (1990). The revised statute contained a new constitutional jurisdictional hook noting that it is illegal to possess near a school a gun that has traveled in interstate commerce. 18 U.S.C. § 922(q)(3)(A) (1995).

"first principles."[18] He then cites all of the sources supporting the conclusion that the pre-1937 version of the commerce power is a far more accurate reading of the historical record. He begins with a citation to *Federalist No. 45*, in which Madison states that "the powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."[19] He then quotes, in rapid succession, the following passages from *Gibbons v. Ogden*:[20]

> Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse.[21]
>
> . . . .
>
> It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary.[22]
>
> Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one. . . . The enumeration presupposes something not enumerated; and that something, if we regard the language, or the subject of the sentence, must be the exclusively internal commerce of a State.[23]

A close reading of what Chief Justice Marshall meant sets the table for a constitutional revolution that, in Chief Justice Rehnquist's hands, never happens. The first quotation suggests that the narrow definition of commerce is traffic (i.e., navigation along a river), and the broad definition is "intercourse" (i.e., all sorts of trade that uses navigation or other means of transportation). If so, then there are many activities that fall within neither definition, including manufacturing, agriculture, and mining. These activities are never mentioned in *Gibbons* as special types of activities that fall within the domain of the federal commerce power. The situation gets even more tenuous for the modern assertion of power because we are told in the second excerpt that the Commerce Clause does not reach all commerce (i.e., traffic plus intercourse) because it does not reach that commerce which is completely intrastate. Nor is it possible to argue that no commerce ever fit that description then or now because of the indirect effect that local transportation, for example, has on interstate activities. The point here is not left to the imagination because Chief

18. *Lopez*, 514 U.S. at 553.

19. *Id.* at 552 (quoting THE FEDERALIST NO. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961)).

20. 22 U.S. (9 Wheat.) 1 (1824). For Justice Brennan's use of the same case, see *infra* note 54.

21. *Lopez*, 514 U.S. at 553 (quoting *Gibbons*, 22 U.S. at 189-90).

22. *Id.*

23. *Id.* (quoting *Gibbons*, 22 U.S. (9 Wheat.) at 194-95) (alteration in original).

Justice Marshall (who was so careful not to tread on Southern sensibilities concerning the ability of Congress to regulate slavery) defined in *Gibbons* what he meant by internal commerce—namely that which takes place "between man and man" within a state.[24] Thus a local sale would be completely internal under this definition, even if the product sold within the state had, in a previous transaction, been shipped in interstate commerce. And Chief Justice Marshall's last quoted sentence uses the words "restricted to" before the phrase "that commerce which concerns more states than one," which must denote cross-border transactions. Chief Justice Rehnquist could have fortified that vision by noting that Marshall used inspection laws as one example of an exclusive state function because they took place at the end of the journey.

Yet Chief Justice Rehnquist does not pause for one moment to analyze the implication of the quoted passages for *Wickard* and *Lopez*. Instead, he continues inexorably in his march through history, citing the full range of cases that indicate that certain activities are within the exclusive power of the states because they involve only internal commerce, in the sense noted above, and hence are beyond the power of Congress.[25] After that, we get a quick excursion through the Interstate Commerce Act and the difficulties raised in the *Shreveport Rate Cases*,[26] *United States v. E.C. Knight Co.*[27] (which held that the Sherman Act could not reach some monopolies due to limits on the commerce power), and a passing nod to *A.L.A. Schechter Poultry Corp. v. United States*[28] (which held that the federal government could not regulate the slaughter and sale of poultry within a state even if the chickens had been imported from outside of the state).

Once done with the old synthesis, Chief Justice Rehnquist marches through the new one. Yet at no point does he highlight, let alone mention, the deep contradiction between the earlier and the later cases. *Wickard*, *Heart of Atlanta*, and *Katzenbach* all rely on the notion that a sufficient nexus is established under the Commerce Clause by showing that the seller in one transaction had purchased goods or supplies from out-of-state vendors.[29] The identical fact pattern that was said dispositively *not* to convert a local transaction into a national one in *Schechter Poultry* now had that effect. Decisions like *Perez v. United States*[30]—which allowed an aggregation of tiny indirect local effects to establish the nexus with interstate commerce—were never juxtaposed with the earlier cases.

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24. *Gibbons*, 22 U.S. at 194.

25. *See, e.g.*, Kidd v. Pearson, 128 U.S. 1 (1888); Veazie v. Moor, 55 U.S. (14 How.) 568 (1852).

26. Houston, E. & W. Tex. Ry. Co. v. United States, 234 U.S. 342 (1914).

27. 156 U.S. 1 (1895).

28. 295 U.S. 495 (1936).

29. Katzenbach v. McClung, 384 U.S. 641 (1966); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Wickard v. Filburn, 317 U.S. 111 (1942).

30. 402 U.S. 146 (1971).

Not only does *Lopez* not seek to reconcile the two divergent lines of cases, but it also does not address the arguments that have been used to expand the scope of the commerce power. The Progressive view is that a national economy always required some system of uniform national regulation to work efficiently.[31] But that view is simply wrong as an economic proposition. What is necessary is a market in which individual states cannot impose blockades against any cross-border transactions. This could be achieved without any direct form of national regulation by employing a negative version of the Commerce Clause that prevents any discriminatory state regulation that is not imposed for health reasons. It seems clear as a textual matter that any hint that the Commerce Clause merely blocked state regulation was roundly rejected when Congress got the affirmative power to regulate. But the older view of the Commerce Clause—which allowed Congress to reach cross-border but not local transactions—was more efficient from an economic viewpoint because it allowed for competition between firms in different states.[32] This distinction between network and competitive industries placed desirable limits on the scope of federal regulation—contrary to all the findings of the Fair Labor Standards Act (FLSA), which identified comprehensive federal regulation as the solution to our economic problems. One might as well argue that all international trade is doomed unless we have comprehensive supranational regulation of national economies. The risks of monolithic control occur in just this context. Decisions like *Hammer*—which prevent the national government from using its powers to subvert competition among the states—represent, by modern economic conceptions, a far more sophisticated view of how federalism should operate than any theory articulated in *Lopez*.

Once Chief Justice Rehnquist completes his road-to-nowhere analysis of the Commerce Clause in *Lopez*, he then announces his test, which reveals a lawyerly ingenuity for making marginal adjustments that no one had previously thought possible. He divides the commerce power into three categories. The first—which regulates "the channels" of interstate commerce[33]—is simply Chief Justice Marshall's regulation of interstate traffic. No problems here. The second—which holds that "Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"—relies on the *Shreveport Rate Cases*.[34] At this point the analysis breaks down because Chief Justice Rehnquist adopts a broad definition of protection that includes among the "threats" competition from intrastate activities. He does not note that those threats were regarded as a social good under the original constitutional design, and thus this case is sharply distinguishable from the

31. *See* Stern, *That Commerce Which Concerns More States than One*, *supra* note 9.

32. I discuss this in greater detail in EPSTEIN, *supra* note 1, at 22-25.

33. United States v. Lopez, 514 U.S. 549, 558 (1995).

34. *Id.*

earlier cases such as *United States v. Coombs*,[35] which allowed regulation under the Commerce Clause as a response to threats. For example, the threat at hand in *Coombs* was physical danger—a theft from a beached ship—and not economic competition.[36] The differences between force and competition, which organize the classical liberal view on individual conduct, turn out to have profound jurisdictional implications as well, and for the same reason. In both contexts force leads to a destruction of social welfare, while competition leads to its increase. Any coherent theory of federalism and free trade thus distinguishes between these two forms of regulation. Chief Justice Rehnquist did not connect the dots: tellingly, the more thoroughgoing opinion of Justice Thomas did.[37]

Matters get still worse because the third prong of Chief Justice Rehnquist's test, in effect, ratifies the decisions in *Wickard*, *Heart of Atlanta*, and *Perez* by adopting a substantial effects theory. This theory provides that "[w]here economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained."[38] He then concludes that the Gun-Free School Zones Act does not fall within this category because gun possession neither involves a voluntary sale of any asset nor influences the prices of assets sold in interstate commerce, as was the case in *Wickard*. The point gets an "A" for ingenuity, but he makes no effort to explain why "economic activity" is the lynchpin on which the scope of federal power should turn given that just about any activity could have some pronounced indirect but substantial effects on interstate commerce. From this point, the future cases will have to contend with a line that is less than clear and, more importantly, that is wholly unprincipled. It is a sign of the differences between Justice O'Connor and Chief Justice Rehnquist that she joined Justice Kennedy's concurrence, which only sought to soften still further the blow that *Lopez* inflicted on the New Deal constitutional order.[39]

There is little reason to go further into the intricacies of the *Lopez* decision or its uneasiness about congressional findings and the absence of some jurisdictional element. The key point is that this incremental strategy easily becomes unglued. This did not happen in the next case in the sequence, *United States v. Morrison*.[40] But it did happen most emphatically in *Gonzalez v. Raich*,[41] which held that the Federal Controlled Substances Act[42] prevented two individuals from either growing or receiving (in gift transactions) medical marijuana that was used solely for home consumption. The case presented a

35. 37 U.S. (12 Pet.) 72 (1838).
36. *Id.* at 78.
37. *Lopez*, 514 U.S. at 584 (Thomas, J., concurring).
38. *Id.* at 560.
39. *Id.* at 568 (Kennedy, J., concurring).
40. 529 U.S. 598 (2000).
41. 125 S. Ct. 2195 (2005).
42. 21 U.S.C. §§ 801-904 (2004).

starkly different profile from *Lopez*, for while Lopez had committed actions illegal under both state and federal law, Raich's possession and use of medical marijuana was legal under California law. Justice O'Connor, in her commendable dissent, understood that the stakes were higher in *Raich* than in *Lopez* and urged that the statute be struck down on grounds that were once—but no longer—fashionable in Progressive circles. The question of medical use of marijuana was one in which the states functioned as "laboratories" for dealing with the core functions of protecting the health and safety of their citizens.[43] Her appeal to "dual sovereignty"[44] fell on deaf ears, and Justice Stevens showed an ill-concealed glee in relying on cases such as *Wickard*, *Heart of Atlanta*, and *Perez* in order to experience "no difficulty"[45] finding that the federal program dominated the state one. The balance of interests tests had no place in a world in which federal preemption is the norm and resistance to federal power takes place only on administrative law or statutory construction grounds, as in *Gonzales v. Oregon*.[46]

There is no question that a stronger decision in *Lopez* that attacked the *Wickard* framework could have easily led to a different result in *Raich*. But it was an uphill battle to explain why the home consumption of marijuana is different in principle from the home consumption of wheat, since local and interstate (or foreign) effects can never be cleanly separated for either wheat or marijuana. A case that is a no-brainer in one direction under *Gibbons* becomes a no-brainer in the opposite direction. This occurred because the Justices in *Lopez* refused to take on the legitimacy of *Wickard* (doubtless because they did not want to take on the New Deal). Incrementalism has its price.

II. DUAL SOVEREIGNTY AND THE TENTH AMENDMENT

The concept of dual sovereignty—which played a supporting role in *Raich*—took center stage in a line of cases that questioned whether the federal government could subject the operations of state and local government to federal regulation under the Commerce Clause. Such regulation would not have survived under the pre-*Wickard* definitions of commerce that stressed cross-border transactions. As long as the federal government had no power to regulate, the Tenth Amendment would have applied in a linear fashion because

43. 125 S. Ct. at 2221 (O'Connor, J., dissenting). Justice Kennedy also refers to this concept in *Lopez*, 514 U.S. at 581 (Kennedy, J., concurring).

44. *Raich*, 125 S. Ct. at 2224 (O'Connor, J., dissenting).

45. *Id.* at 2207.

46. 126 S. Ct. 904 (2006). Here the liberal bloc flipped to hold that the Attorney General did not have authorization under the Controlled Substances Act to override the Oregon Death with Dignity Act, OR. REV. STAT. § 127.800 (2005). This law authorizes doctors to prescribe lethal doses of drugs to terminally ill patients seeking to end their lives. Federalism came in, if at all, through the back door because of Justice Kennedy's refusal to accord the Attorney General's position the same level of *Chevron* deference that would have been available to an administrative agency. *Gonzales*, 126 S. Ct at 916.

the Constitution grants no power to regulate to the federal government. But under *Darby*,[47] the Tenth Amendment became a "truism" because the Commerce Clause was read to be broad as well as deep.[48] So the issue of dual sovereignty surged to the fore because the federal government was seeking to limit state power.

In dealing with this issue, then-Associate Justice Rehnquist took the position for a fragile majority in *National League of Cities v. Usery*[49] that the federal government had no power to regulate the actions of state governments under the Commerce Clause. This holding meant that the extension of the minimum wage provisions of the FLSA to state and local government employees was invalid, at least insofar as it applied to employees who were engaged in "traditional government functions" (which included "fire prevention, police protection, sanitation, public health, and parks and recreation").[50] The hard task Rehnquist faced—which he had mentioned in *Fry*—was to explain why state immunity from direct regulation did not render the income of state employees immune from the federal income tax,[51] as had previously been the case.[52] Justice Rehnquist distinguished the older tax cases on the ground that a nondiscriminatory level of taxation does not impose a direct limitation on how state governments run their internal operations. Perhaps in going this far he conceded too much to federal power. But the general nondiscrimination provision has far less appeal as the level of intrusion increases, so Rehnquist has a point in drawing the awkward line between cases in which state sovereign immunity protects only against discriminatory treatment and those in which it affords absolute immunity.

Even when confined to direct regulation of government activities, the great virtue of Rehnquist's decision was that it sought to impose a categorical rule to demarcate the scope of state and federal authority. But the internal structure of the opinion left a great deal to be desired on two fronts. First, on textual

47. United States v. Darby, 312 U.S. 100 (1941).

48. *See id.* at 124.

49. 426 U.S. 833 (1976).

50. *Id.* at 851. In so doing, he had to break a fair bit of legal china. *See* Fry v. United States, 421 U.S. 542 (1975) (using the conventional Commerce Clause analysis to justify the imposition of wage caps on state employees under the Economic Stabilization Act of 1970, Pub. L. No. 91-379, 84 Stat. 799). The Rehnquist dissent took issue with this position in *Fry*, 421 U.S. at 549-59. In *National League of Cities*, Rehnquist distinguished *Fry* on grounds that can only be described as dubious—namely, that a temporary freeze of wages intruded on state sovereignty much less than the law at issue in *Maryland v. Wirtz*, 392 U.S. 183 (1968). *National League of Cities*, 426 U.S. at 853. But the overall analysis adopted the classic post-*Wickard* Commerce Clause approach and cared little for these details.

51. *See Fry*, 421 U.S. at 554-56 & n.1.

52. Collector v. Day, 78 U.S. (11 Wall.) 113, 125 (1870) ("[T]he means and instrumentalities employed for carrying on the operations of their [state] governments, for preserving their existence, and fulfilling the high and responsible duties assigned to them [the states] in the Constitution, should be left free and unimpaired, should not be liable to be crippled, much less defeated by the taxing power of another government.").

grounds, Rehnquist seems absolutely wrong to argue that the FLSA regulations "are not within the authority granted Congress"[53] under the Commerce Clause, unless *Wickard* is overruled (which wasn't part of Rehnquist's plan).[54] If the scope of federal power depends on the substantial effects test, then the minimum wage applies to both state and private workers: all economic relationships are conclusively presumed to be interdependent, as Rehnquist later concluded in *Lopez*. The better argument is that dual sovereignty requires the adoption of an implied immunity of state governments from federal legislation. This point is old; *McCulloch v. Maryland*[55] invoked the doctrine of intergovernmental unity to protect the operations of the federal government from state regulation.[56] That doctrine is one of modest importance because the Supremacy Clause always allows the federal government to use federal legislation to protect its own operations from state incursion.[57] But intergovernmental immunity is a much bigger deal insofar as it is meant to shield state governments from federal power, because the Supremacy Clause blocks the states from using the same self-help remedy left open to the federal government. On this ground, it seems, moreover, that Rehnquist's judgment is

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53. *National League of Cities*, 426 U.S. at 852.

54. Justice Brennan's dissent is intellectually scandalous when he responds:

> It must therefore be surprising that my Brethren should choose this bicentennial year of our independence to repudiate principles governing judicial interpretation of our Constitution settled since the time of Mr. Chief Justice John Marshall, discarding his postulate that the Constitution contemplates that restraints upon exercise by Congress of its plenary commerce power lie in the political process and not in the judicial process.

National League of Cities, 426 U.S. at 857 (Brennan, J., dissenting). Marshall *never* used the grotesque expression "plenary commerce power." What he said was exactly the opposite of Brennan's slippery paraphrase:

> If, as has always been understood, the sovereignty of Congress, *though limited to specified objects*, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States.

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 197 (1824) (emphasis added). The words "though limited to specified objects" get lost in the Brennan translation, which sows conscious confusion. Marshall's reading of the Commerce Clause said that there was total control in a narrow area. Brennan's reworking said there was total control over everything.

55. 17 U.S. (4 Wheat.) 316 (1819), *stressed in* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888-1986, at 564 (1990).

56. CURRIE, *supra* note 55, at 564. Currie also describes as "fanciful, if not facetious," the arguments of Professors Tribe and Michelman that *National League of Cities* somehow creates a right in all citizens to receive basic public services. *See generally* Frank I. Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in* National League of Cities v. Usery, 86 YALE L.J. 1165 (1977); Laurence Tribe, *Unraveling* National League of Cities*: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065 (1977). These two articles—each written by an eminent academic—show perfectly the temper of the time in which *National League of Cities* was decided. The strong statist sentiments expressed by Michelman and Tribe show the legal alchemy that reads a decision intended to limit federal power as a new charter for affirmative rights to state support.

57. U.S. CONST. art. IV, § 2.

quite secure.

The Achilles heel of the Rehnquist decision was not its willingness to go as far as it did but its failure to go one step further. Assume for the moment that it is possible to develop some theory which allows us in an age of expanded government activity to demarcate those functions that count as traditional government functions and those which do not. The hard question—not addressed in *National League of Cities*—is why the level of sovereign immunity for the states is in fact limited to those tasks. The simplest justification is that one or another of the provisions of the Fourteenth Amendment limits the scope of state activities, and that these are limitations that Congress can enforce by appropriate legislation under Section 5. At that point the limitation on state power is based on explicit constitutional norms that in every instance should trump the strong but residual claim of dual state sovereignty. But one key portion of the New Deal revolution was to gut any limitations on the commerce power in order to spur further federal regulation of otherwise competitive labor markets. Once those limits are removed, it becomes more difficult to deny that Congress should have the last word about which state activities should be insulated from federal control. One alternative approach is to hold that states as sovereigns should be able to make their own constitutional judgments on the scope of their own operations, so that the only time a state forfeits control over its own operations is when it enters into ventures that operate outside its territory—a tiny fraction of cases. At this point the line-drawing side of the issue drops out, for it is no longer necessary for the Supreme Court to figure out which of the state's activities within its boundaries are subject to federal oversight and which are not. So long as it is a state-run program, then there is no federal oversight, period.

This approach has the odd feature of giving local programs operating under state control a leg up on their private competitors—much the way that religious organizations can trade on their general immunities in competition with secular institutions, like schools, that are subject to major regulation.[58] But that market distortion should be chalked up to *Wickard*'s overreaching and not to the doctrine of sovereign immunity. Go back to *Gibbons* and, lo and behold, the sovereign advantage is lost because private firms are freed of regulation. The odd conclusion is that Justice Rehnquist was wrong in *National League of Cities* because he did not go far enough, not because he went too far.

This timidity (which was strictly necessary to win over the hesitant fifth vote of Justice Blackmun) proved eventually to be the undoing of that decision. Nine years later, in *Garcia v. San Antonio Metropolitan Transit Authority*,[59] a newly contrite Justice Blackmun made the centerpiece of his argument the inability to identify traditional government functions, even though it hardly breaks a sweat to put running a local transit system on the traditional side of the

58. *See, e.g.*, NLRB. v. Catholic Bishop of Chi., 440 U.S. 490 (1979).

59. 469 U.S. 528 (1985).

line.[60] At this point, the basic happy story about the minimum wage and overtime laws kicked in. These modest interventions did not lead to any real dislocations; hence, the rules in question were not "destructive of state sovereignty," given that the city's transit authority "faces nothing more than the same minimum-wage and overtime obligations that hundreds of thousands of other employers, public as well as private, have to meet."[61] In effect, the idea of sovereignty becomes exclusively a nondiscrimination principle in which the protection of the state lies in the fact that it is in the same position as all private firms. That result seems defensible in the cases in which the federal government imposes taxes on the income of state employees, or even state municipal bonds, where there is little or no direct control over the state's own management decisions. But it seems risky to extend that same notion to direct orders on how the state should conduct its internal operations because the very notion of sovereignty is that it gives the state some edge over private parties. Unfortunately, these refinements are lost in *Garcia*'s constant refrain that political safeguards are always available in federalism questions—a point which mistakenly suggests that no constitutional principle remains operative in this area.[62]

In *Garcia*, both Justices Rehnquist and O'Connor were on the side of the angels, and their decisive defeat shows just how difficult it was for them to maintain their counteroffensive against the relentless assertion of federal domination. But to their credit, the issue of federalism resurfaced in yet other guises that also show the large gulf between general rationales and particular legal doctrines. First, in *Gregory v. Ashcroft*,[63] the question before the Court was whether the protections of the Age Discrimination in Employment Act (ADEA) applied to state judges (who were not just any employees), notwithstanding the Tenth Amendment. There is of course no real question that selection of judges counts as a core attribute of state sovereignty. Thus, if *National League of Cities* had remained in force, the case would have been easy. But after *Garcia,* the articulation of a principle of resistance against the use of federal power had to take a different form. On this issue, Justice O'Connor began by citing the same passage from James Madison in *Federalist No. 45* to which Chief Justice Rehnquist had appealed in *Lopez*.[64] She then

60. *Id.* at 538-39. The cases were indeed a jumble in that the operation of a municipal airport and a highway authority were treated as traditional government functions while, miraculously, the regulation of high traffic on public roads and air transportation were not. Clearly there was powerful resistance to *National League of Cities* in the lower courts.

61. *Id.* at 554.

62. For the academic defense of this position, see JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 175-184 (1980); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954), *cited in Garcia*, 469 U.S. at 551 n.11.

63. 501 U.S. 452 (1991). The earlier decision of *EEOC v. Wyoming*, 460 U.S. 226 (1983), had held that the ADEA reached state employees under the Commerce Clause.

64. *Gregory*, 501 U.S at 458.

followed the influences of Michael McConnell[65] and Deborah Merritt,[66] writing:

> This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.[67]

A moment's reflection should reveal that this impressive list of advantages could only be achieved in settings in which the states were allowed to enter into competition with each other so that the exit option would constrain the domination of the state government.[68] But the only way in which any of these objectives can be fully achieved is to make sure that Congress does not have control over all issues. The great fear here is that once Congress can specify, for example, an age discrimination act, it eliminates one dimension over which important competition can take place among the states. The unlimited ability to regulate just about every aspect of labor markets, therefore, subverts the very objectives to which Justice O'Connor's theory refers. Her serious defense of federalism points unambiguously to the dual sovereignty theory of *National League of Cities*, whose demise in this area precluded any effort to align the underlying rationale with the legal rule. Instead of the strong form of protection here, we are reduced to accepting some version of the clear-statement rule:

> We are constrained in our ability to consider the limits that the state-federal balance places on Congress' powers under the Commerce Clause. See *Garcia* [citations omitted] (declining to review limitations placed on

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65. *Id.* (citing Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1491-1511 (1987)).

66. *Id.* (citing Deborah Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 3-10 (1988)).

67. *Id.*

68. *See, e.g.*, Richard A. Epstein, *Exit Rights Under Federalism*, 55 LAW & CONTEMP. PROBS. 147 (1992); *see also* Vicki Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473 (1991). The gist of Been's article is that the exit option is sufficiently strong so that it weakens the case for explicit federal property protections, as parties facing the risk of confiscation can just leave. That position is subject to two serious objections. The first is that Been's article does not identify any federal constitutional protection of the exit right against state regulations that would, for example, tax local firms an amount equal to the money that they would lose if they remained inside the state. Second, the exit right, even if protected, would offer no assistance to the owners of land or other immobile assets for whom the exit option does not work. All this is not to say that the exit option has no value at all. The ability of individuals to pick up and leave, which is protected under the Privileges or Immunities Clause of the Fourteenth Amendment, *see* Edwards v. California, 314 U.S. 160 (1941), remains an important protection against state domination, even though it can easily be misapplied by reading the Privileges or Immunities Clause as offering protection to welfare rights. *See* Saenz v. Roe, 526 U.S. 489 (1999).

> Congress' Commerce Clause powers by our federal system). But there is no need to do so if we hold that the ADEA does not apply to state judges. Application of the plain statement rule thus may avoid a potential constitutional problem. Indeed, inasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise.[69]

This effort to finesse the situation does slow down the juggernaut, but it creates independent difficulties of its own because the clear-statement rule is an open invitation for judges who are hostile to the scope of federal power to misread or at least overread the relevant statutes. We thus live in a constitutional netherworld in which the rules of strict construction are at war with the attitude of extreme deference to the political process that drove the initial decision in *Garcia* in the first place. All this is not to say that this canon of construction has no effect. It allows statutes to be read against their ordinary meanings, which puts the matter back into the hands of Congress for clarification where legislative inertia and interest-group politics can prove strong enough to prevent the reversal of fortune, as in *Gregory*. But the overall institutional assessment is hard to come by because once the clear-statement rule is known, the dynamics of interest-group bargaining will change. The defenders of expanded federal regulation will now have an incentive to push for a higher level of textual clarity—that all state judges are covered by the ADEA—that they might not have demanded if they knew that statutory construction would be judged by some ordinary-meaning rule. In the end, therefore, it is very hard—and it is difficult to think of real data on the point—to know just how far this rule moves the long-term political equilibrium between state and federal power. This is especially so in a world in which the expansive reading of the Commerce Clause has not led to a rise of federal power on such key local issues as zoning. But for those who accept the strong arguments that Justice O'Connor advanced in defense of federalism, the old saw remains true. The clear-statement rule may, at a guess, regain ten percent of the territory lost when *National League of Cities* bit the dust.

Fortunately, Justice O'Connor's next maneuver proved more powerful. She relied on *Gregory* the next year in *New York v. United States*,[70] which challenged certain provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985.[71] One set of provisions allowed the federal government to authorize increased surcharges on the waste shipped from other states that had not met their own targets for solid-waste disposal. In addition, the statute provided that any state that did not meet certain targets under the Act could be required to "take title" to ultrahazardous wastes within the system. In

69. *Gregory*, 501 U.S. at 464.

70. 505 U.S. 144 (1992).

71. Pub. L. No. 99-240, 99 Stat. 1842 (1986) (current version at 42 U.S.C. §§ 2021b-2201j (2006)).

dealing with the constitutional challenges to the statute, Justice O'Connor started with a broad view of the commerce power that covered far more than the ability to ensure the free shipment of hazardous waste across state lines. Justice O'Connor, thus, had no difficulty sustaining the various financial incentives created under the Act.[72] But she did draw the line with the statutory "take-title" provisions which in effect ordered one sovereign to act at the behest of another.[73]

In my view, both of these provisions are suspect in that the proper reading of the Commerce Clause gives the federal government no say in local waste disposal issues unless its storage somehow impedes the flow of interstate commerce. But in a world in which the expanded scope of the Commerce Clause is taken as a given, Justice O'Connor has at least drawn the correct lines. It is hard to understand what state sovereignty means if the federal government can commandeer state officials, with or without compensation, to carry out its own plan. The level of intrusion is far greater than a simple tax on the income of state officials, and the only principled place to stop the creep is before it begins. *New York* thus differs from *Gregory* in that it goes beyond rules of construction to impose actual substantive limitations on federal power. There are of course substantive distinctions between *New York* and the follow-on case of *Printz v. United States*,[74] which invalidated the Brady Act[75] insofar as it required state police personnel to run background checks on gun purchasers. The Supreme Court (through Justice Scalia) struck down the provision on the ground that it did not matter *how* the United States subordinated state officials to public tasks, so long as that is what it did. In principle, it is a shadowy line between the imposition of a general form of cost regulation on state officials of the sort that *Garcia* allows and the demands to perform specific tasks that both *New York* and *Printz* prohibit. Yet once again it is hard to expect better in an area in which the bloated view of federal power requires rearguard actions that lead only to inelegant compromises.

III. STATE SOVEREIGN IMMUNITY

A. *Background*

The last of the federalism issues on which Rehnquist and O'Connor sought to break from the dominant New Deal synthesis was the contentious topic of sovereign immunity. Instead of dealing with the direct forms of federal regulation that give rise to the clash between the (bloated) Commerce Clause and the Tenth Amendment, sovereign immunity concerns the ability of any

72. *New York*, 505 U.S. at 173-74.

73. *Id.* at 174-75.

74. 521 U.S. 898 (1997).

75. Brady Handgun Violence Prevention Act (Brady Act), Pub. L. No. 103-159, 107 Stat. 1536 (1993) (current version at 18 U.S.C. § 922 (2006)).

party to sue a state for either legal relief (chiefly in the form of damages) or equitable relief (chiefly in the form of injunctions and orders for specific performance).

The conceptual defense of sovereign immunity has always been troublesome because the doctrine cuts against the basic proposition that all individuals should answer for their (natural law) wrongs—most critically for breaking promises or for committing torts against third persons.[76] Sovereign immunity thus starts from that powerful positivist stance that all law is measured not by its moral content but by its origin. Justice Holmes put the point bluntly in *Kawananakoa v. Polyblank*: "A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."[77] Taken literally, that proposition could mark the death of constitutionalism. Accordingly, anyone who starts with a strong libertarian premise (and indeed with any rights-based perspective) has always chafed at this overt exceptionalism, especially as it pertains to workaday contract and torts disputes to which the state is a party. Why not ask sovereigns to follow the usual rules of tort and contract, at least when they act like other citizens? A provision, for example, of the Federal Tort Claims Act waives federal sovereign immunity in routine cases on just that theory[78] but preserves it in many key settings, including those which involve the discharge of some "discretionary function."[79] Most states follow similar rules, for similar reasons.[80]

It is, of course, one thing for a sovereign to waive its own immunity from suit and quite another for that immunity to be stripped of it against its will. The key constitutional inquiry is whether the well-nigh universal practice of state sovereign immunity survived the adoption of the Constitution. On one hand, survival was easy, since states could still refuse to allow suits against them to be brought in their own courts. But the adoption of the Federal Constitution created a new forum in federal court in which the defense of sovereign

76. For an exhaustive study of the historical ambiguity toward sovereign immunity on just these grounds, see *Alden v. Maine*, 527 U.S. 706, 764-77 (1999) (Breyer, J., dissenting).

77. 205 U.S. 349, 353 (1907) (holding that a state to which property had been conveyed could not be joined as a defendant in a foreclosure action brought by the holder of the equity of redemption).

78. 28 U.S.C. §§ 2671-2680 (2006). Section 2674 provides: "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . . ."

79. *Id.* § 2680(a). It reads:

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

80. *See, e.g.*, 745 ILL. COMP. STAT. ANN. 5 (2006).

immunity could be challenged if the only rationale were that it was not possible or practicable to allow suits "as against the authority that makes the law on which the right depends."[81] Yet at the same time, it would be exceedingly odd to think that the formation of a federalist system with its second tier of courts was meant to abrogate any immunity that states had enjoyed as independent sovereigns. So long as states could plead sovereign immunity in other state courts before the adoption of the Constitution, they should be able to plead it afterwards, or so it could be sensibly argued.

This point was not explicitly resolved by the text, but the remarks of Alexander Hamilton in *Federalist No. 81* resoundingly support the sensible proposition that the formation of the Union did not alter the traditional confines of sovereign immunity, no matter how unsatisfactory its theoretical underpinnings. Thus the full passage reads:

> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent.* This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of State sovereignty were discussed in considering the article of taxation and need not be repeated here. A recurrence to the principles there established will satisfy us that there is no color to pretend that the State governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action independent of the sovereign will.[82]

Justice Breyer has taken the position that Hamilton "had in mind state sovereign immunity only with respect to diversity cases applying state contract law."[83] But the text does not read so narrowly. The first sentence is categorical; the passage itself never discusses explicitly the different heads of jurisdiction; and the term "debt" does not embrace only contractual obligations of the sort

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81. *See Kawananakoa*, 205 U.S. at 353.

82. THE FEDERALIST NO. 81, at 487 (Alexander Hamilton) (Clinton Rossiter ed., Penguin Books 1961).

83. Alden v. Maine, 527 U.S. 706, 773 n.13 (1999). For another effort to read *Federalist No. 81* out of the debate, see JOHN T. NOONAN, JR., NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES 81 (2002) (arguing that the general grant of jurisdiction in Article III "had ceded their sovereign where the federal constitution granted power to the nation"). But a grant of jurisdiction is quite consistent with the ability to plead sovereign immunity as an affirmative defense to any suit so brought, and the entire tenor of Hamilton's passage indicates that nothing in the Constitution disturbed that balance. For further criticism, see David P. Currie, *Inflating the Nation's Power: Review of John T. Noonan,* Narrowing the Nation's Power, 71 U. CHI. L. REV. 1229 (2004).

that attract diversity jurisdiction but also fixed obligations to pay money, regardless of their source.[84]

Matters became only more complicated with *Chisholm v. Georgia*,[85] in which a citizen of South Carolina filed suit in the United States Supreme Court as an executor for nonpayment of debts incurred when the decedent had supplied goods to Georgia during the Revolutionary War. The Supreme Court, by a four-to-one vote, held that it had original jurisdiction over Georgia without its consent.[86] Article III, Section 2, Clause 1 extended the judicial power to "Controversies between a State and Citizens of another State,"[87] which fit this case perfectly. Article III, Section 2, Clause 2 gave the Supreme Court original jurisdiction in all cases "in which the state shall be a party."[88]

B. *The Eleventh Amendment*

These jurisdictional provisions cover *Chisholm*, but they do not resolve whether a state could plead in the Supreme Court the defense of sovereign immunity, no questions asked. The uneasiness with *Chisholm* led to the adoption of the Eleventh Amendment, which reads in full: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[89] This sentence covers the situation in *Chisholm* but does not address the more obvious question of whether a citizen can sue his own state in federal court or whether federal law could remove the operation of the doctrine of sovereign immunity in the home state's courts.

In my view, the key to understanding this provision lies in its use of the word "construed," which makes it clear that the Eleventh Amendment does not in itself remove judicial power but essentially corrects the misimpression that Article III removes the defense of sovereign immunity. Unfortunately, the opening clause of the Amendment is somewhat inapt for the occasion because it declares that there is no judicial power over these suits. This declaration makes it appear as though a state could not waive its defense of sovereign immunity because subject matter jurisdiction cannot be waived. (States have always been permitted to waive sovereign immunity. They do so most simply by not pleading it as an affirmative defense.)[90] Subject to that glitch—which

84. *See, e.g.*, C.H.S. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW: TORT AND CONTRACT 220-26 (1949).

85. 2 U.S. (2 Dall.) 419 (1793).

86. *Id.*

87. U.S. CONST. art. III, § 2, cl. 1.

88. U.S. CONST. art. III, § 2, cl. 2.

89. U.S. CONST. amend. XI.

90. For one early recognition of the hornbook rule, see *Clark v. Bernard*, 108 U.S. 426 (1883).

has been cured by judicial interpretation—the most sensible reading of the Eleventh Amendment is that it undid *Chisholm*. This means that we are back to the status quo ante, which includes the implied doctrine of sovereign immunity that protected each state from suit in *any* state or federal court without its consent. That reading was more or less adopted, with a sensible citation of the historical sources, in *Hans v. Louisiana*.[91] That case involved the repudiation of reconstruction bonds and was decided, significantly, seven years before the prohibition against takings was held to bind the states.[92] It is therefore something of an oddity for courts to speak as if the entire sovereign immunity doctrine rests solely on the Eleventh Amendment, when the text is at war with its meaning. One clear implication of the early decisions is that the contemporaneous grant of powers to Congress under Article I, Section 8 does not alter the previous balance on sovereign immunity; if it did, all that Hamilton wrote would be otiose.

The plot thickens with the expansive reach of the commerce power under the New Deal reformulation to cover just about all productive activities within the state. Under the older view—which held that sovereign immunity was not altered by any grant of power in Article I, Section 8—nothing else changes: sovereign immunity remains the same notwithstanding the expansion of the commerce power. But if any exercise of Congress's power under Article I, Section 8 abrogates sovereign immunity, then a state's immunity is always subject to an expression of federal law. This deals a shattering blow to the principle of dual state sovereignty and enshrines the dominant New Deal agenda of federal hegemony.

Against this backdrop, it is not surprising that the battle lines divide on this question in the same fashion that they did over the Tenth Amendment. Thus in dealing with this question in *Pennsylvania v. Union Gas Co.*,[93] Justice Brennan, writing for a plurality, cashed out sovereign immunity as a clear-statement rule—almost in anticipation of *Gregory v. Ashcroft*. He then found correctly on the issue of statutory construction that the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended, intended to abrogate state sovereign immunity.[94] The "plenary" power of the federal government undid the doctrine of sovereign immunity, even though *none* of the strong substantive reasons for state independence are addressed—let alone answered—by a clear-statement rule. In some cases, such a rule might spare the state, but once the rule becomes settled, it will not. As is the case with the Tenth Amendment, once the rule itself becomes clear, then the political forces that favor allowing private actions against the state know how to push statutory language in the correct direction.

91. 134 U.S. 1 (1890).
92. Chi., Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226 (1897).
93. 491 U.S. 1 (1989).
94. 42 U.S.C. §§ 9601-9675 (1988).

The political equilibrium will adjust the terms of the statute to satisfy the desired collective outcome. The system of dual sovereignty, which was the key to getting the Union off the ground, was undone by piling the overriding of sovereign immunity atop the once unimagined scope of the Commerce Clause.

This situation, however, did not prove to be a rerun of *Garcia*. Instead, Chief Justice Rehnquist, joined by Justice O'Connor, was able to turn the tables, overrule *Union Gas*, and reinstitute the basic doctrine of sovereign immunity by laying down the clear rule that state sovereign immunity had survived all grants of legislative powers to Congress under Article I. The key decision was *Seminole Tribe of Florida v. Florida*,[95] which held that when Congress passed the Indian Gaming Regulatory Act[96] pursuant to what is called the Indian Commerce Clause,[97] it could not override the defense of sovereign immunity, no matter how clearly it wished to do so. Chief Justice Rehnquist stated that the key issue was, "Does the Eleventh Amendment prevent Congress from authorizing suits by Indian tribes against States for prospective injunctive relief to enforce legislation enacted pursuant to the Indian Commerce Clause?"[98]

Fortunately, the misdirection play was more aesthetic than substantive, because in the next breath Chief Justice Rehnquist announces that the Eleventh Amendment really does not mean what it says but only counts as a stand-in for the general principle of sovereign immunity announced by Hamilton in *Federalist No. 81* and ratified in *Hans v. Louisiana*.[99] As Rehnquist well understood, it is an open question whether it is sound policy for the federal government to require states to negotiate in good faith with the Indian tribes about the opening of casinos within state borders. But the doctrine of sovereign immunity is content neutral and must be applied in the same way regardless of the answer to that question.

The basic logic of sovereign immunity and *Hans* also shed light on the bitterly divided five-to-four decision of *Alden v. Maine*,[100] which held that the doctrine of sovereign immunity protected Maine against suit under the Federal Fair Labor Standards Act[101] in its own state court. The decision follows from the proposition that the states had the same right to assert the defense of sovereign immunity after the adoption of the Constitution as they did before it was adopted. The question, moreover, is not, as Justice Souter argued, whether the states followed a uniform practice of invoking the doctrine on every occasion.[102] The key question is whether the states have the power to plead

95. 517 U.S. 44 (1996).
96. 25 U.S.C. §§ 2701-2721 (1996).
97. U.S. CONST. art. I, § 8, cl. 3.
98. *Seminole Tribe*, 517 U.S. at 53.
99. *Id.* at 54 (discussing Hans v. Louisiana, 134 U.S. 1, 10 (1890)).
100. 527 U.S. 706 (1999).
101. 29 U.S.C. §§ 201-219 (1998).
102. *Alden*, 527 U.S. at 764-73.

sovereign immunity. The fact that they choose to waive it in some cases confirms the existence of the power. If the doctrine of sovereign immunity were not available, then there would be no need to worry about its waiver.

The relatively clear structural rule took a beating in January 2006 when Justice O'Connor joined the four dissenting justices of *Seminole Tribe* in *Central Virginia Community College v. Katz*[103] to hold that Article I, Section 8, Clause 4, which empowers Congress to establish "uniform Laws on the subject of Bankruptcies throughout the United States," provided sufficient authorization to allow a trustee in bankruptcy to sue a state instrumentality to void a preference that it had received from the repayment of a student loan. As a matter of hornbook bankruptcy law, a preference arises when an insolvent debtor pays money for or on account of an antecedent debt discharged within ninety days of the filing of a bankruptcy petition.[104] The objective is to prevent the strategic behavior that takes place when hard-pressed debtors favor one set of creditors over another in order to ward off particular collection actions.

In dealing with this issue, it is important to note that the doctrine of sovereign *immunity* is, as its name suggests, defensive: it only provides for protection against suit. It does not deal with the separate question of whether any state should be allowed to maintain a suit against an individual who has obtained the protection of a bankruptcy court. Justice Stevens, therefore, was quite unconvincing when he explained in great detail that the uniformity provision was intended to make sure that debtors who had received discharges in one state were not subject to suit or, worse, imprisonment at the hands of another state.[105] Thus it has been long established that "[s]tates, whether or not they choose to participate in the proceeding, are bound by a bankruptcy court's discharge order no less than other creditors."[106] Even conceding that this point is true, it hardly explains why the state should be forced in a federal bankruptcy proceeding to turn over assets to the private trustee in bankruptcy when they could not be required to so do in any insolvency proceeding organized under state law. Nor does it make any difference that a bankruptcy provision operates on the debtor's estate as a unitary body, instead of the fragmented claims of different creditors.[107] The uniformity provision does not require that all debts be treated exactly the same, and Congress can provide that certain debts are not dischargeable in bankruptcy (as it has in the past). "Uniform" only refers to geographical uniformity (critical for the system), and it is wrong to suppose that there is any constitutional requirement that the bankruptcy court exercise "exclusive jurisdiction over *all* of the debtor's property," including preferences

103. 126 S. Ct. 990 (2006).

104. 11 U.S.C. § 547(b) (2006).

105. *Katz*, 126 S. Ct. at 996-1005.

106. *Id.* at 996 (Stevens, J.) (quoting Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 448 (2004)).

107. *Id.* at 1000.

paid to states.[108] Justice Thomas is correct in his dissent when he notes that nothing about the discharge cases, or the in rem nature of bankruptcy proceedings, requires this exception to the rule of sovereign immunity.[109] The uniform rules of bankruptcy need only provide that all states cannot be required to turn over preferences to a private trustee. In sum, apart from the limited (but mistaken) exception established in *Katz*, the basic rule of *Seminole Tribe* still stands: Article I does not limit the scope of sovereign immunity. The same cannot be said of either the Bill of Rights or the Fourteenth Amendment, given their substantive orientation.

C. *The Bill of Rights and the Fourteenth Amendment*

The status of the sovereign immunity doctrine does not depend solely on the structural provisions of the Constitution. It also depends on the interplay of sovereign immunity with the substantive guarantees found both in the Takings Clause and the Fourteenth Amendment, which I shall take up in order. I shall begin with a brief historical account in order to set the stage for an analysis of the contribution of Chief Justice Rehnquist and Justice O'Connor in this area.

1. *The Takings and Equal Protection Clauses as limitations on state sovereign immunity*

There is an obvious tension between the Takings Clause and the doctrine of state sovereign immunity. The former commands that the state pay for the property it takes. The latter appears to bar any suit to recover the money that is owed. At the very least, the Takings Clause seems to require compensation when the state enters into occupation of land or other property. Yet by the same token, it does not appear to upset the doctrine of sovereign immunity insofar as it applies to the contractual or other business relationships that a state has with other persons, including, of course, its own employees and contractors. In this regard, it seems to track the doctrine of charitable immunity, which governs the ordinary work of charitable institutions but never blocks suits against charities for the harms they inflict on strangers.[110] The full set of hard intermediate cases all revolve around cases where the state damages the property of a private individual, as by flooding[111] or sonic boom,[112] but does not purport to take title

108. *Id.* at 996 (emphasis added).

109. *Id.* at 1010-13 (Thomas, J., dissenting).

110. *See, e.g.*, Powers v. Mass. Homoeopathic Hosp., 109 F. 294, 304 (1st Cir. 1901) (finding no immunity for nuisance when nonprofit hospital, engaging in property management, inflicts harms on strangers).

111. Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166, 177-78 (1871).

112. *See* Laird v. Nelms, 406 U.S. 797 (1972) (denying recovery under the Federal Tort Claims Act for damage caused by sonic boom; no constitutional claim was pressed, given the accidental nature of the harm); Keokuk & Hamilton Bridge Co. v. United States,

to the property in question. These cases have generally been held to fall outside the scope of the Takings Clause, which under *Barron v. Baltimore*,[113] was held to apply only to the federal government. Although I have many qualms about this narrow reading of the Takings Clause,[114] I shall assume that it is correct in order to address how the Takings Clause limits the sovereign immunity of the states.[115]

For its part, the Fourteenth Amendment authorizes Congress to enforce its guarantees by appropriate legislation, which explicitly eliminates the sovereign immunity defense under all three clauses of Section 1: Privileges or Immunities, Due Process, and Equal Protection. Early on, the Privileges or Immunities Clause was read out of the Fourteenth Amendment in the *Slaughter-House Cases*,[116] so that the legal action took place under the Due Process Clause, with such decisions as *Lochner v. New York*,[117] and later under the Equal Protection Clause, where once again the state was normally allowed broader discretion when it operated its own activities than when it regulated the activities of private citizens.[118] The challenge that the Supreme Court faced was to determine how much of the doctrine of sovereign immunity survived the adoption of these two clauses.

2. *Recent cases*

The question, therefore, is how this framework of analysis plays out in the Court's docket when the Enforcement Clause, Takings Clause, and Equal Protection Clause are invoked to overcome state sovereign immunity. Three recent cases define the relevant universe related to the Takings Clause and Enforcement Clause. In *City of Boerne v. Flores*,[119] the question was whether the Religious Freedom Restoration Act (RFRA)[120] was caught by the doctrine of sovereign immunity or shielded from constitutional attack under Section 5 of the Fourteenth Amendment. Chief Justice Rehnquist was right to side with Justice Kennedy in thinking that RFRA went too far and that Justice O'Connor was wrong to join the dissent. Its basic (and laudable) purpose was to undo the

260 U.S. 125, 127 (1922) (disallowing compensation in "an ordinary case of incidental damage which if inflicted by a private individual might be a tort but which could be nothing else").

113. 32 U.S. (7 Pet.) 243 (1833).

114. *See* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 44-47, 87-88 (1985).

115. Chi., Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226 (1897).

116. 83 U.S. (16 Wall.) 36 (1873).

117. 198 U.S. 45 (1905).

118. For my defense of this standard in the context of affirmative action, see Richard A. Epstein, *A Rational Basis for Affirmative Action: A Shaky but Classical Liberal Defense*, 100 MICH. L. REV. 2036 (2002).

119. 521 U.S. 507 (1997).

120. 42 U.S.C. §§ 2000bb-2000bb-4 (1996).

rule in *Employment Division v. Smith*,[121] which held that state regulations did not have to make any special accommodations for religious practices under the Free Exercise Clause so long as regulations applied equally to both religious and nonreligious groups. Justice Kennedy was right to reject that maneuver. So long as *Smith* remains good law, the purported remedy goes beyond the alleged invasion of right, and thus trenches on authority that is otherwise left to the states. The only cure is to overturn *Smith*.

The relevant question is not dissimilar from that posed when assessing the propriety of injunctive relief in any ordinary case. The issue is whether the chosen remedy matches the underlying wrong. So long as one is dealing with general rules in advance of specific harms, one type of error is to cut too deeply into legitimate practices in order to stop all possible wrongs. The second error is to tread too gingerly so that some of the wrong is left untouched. These two types of mistakes are *not* symmetrical under the Fourteenth Amendment. Underinclusion does not trench on state authority, while overinclusion does. In this instance, there were few if any wrongs under the applicable (if misguided) *Smith* standard that required this ostensible cure. The excessive reach of the remedy was disproportionate to the wrong. Justice Kennedy worked within this tradition when he insisted that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[122] Well done!

The plot thickened with the related cases on sovereign immunity decided shortly after *Alden*. In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,[123] the College Savings Bank sued Florida Prepaid, a department of Florida, for infringement of its business method patent under the Patent Remedy Act.[124] By its terms, this Act expressly allows patent owners to bring infringement actions against states and their instrumentalities, officers, and employees. In the companion case, *College Savings Bank v. Florida Prepaid Post Secondary Education Expense Board*,[125] the same parties squared off when College Savings sued Florida Prepaid for false advertising under the Lanham Act.[126] The two cases revealed the same deep fissure between liberals and conservatives—only this time the liberal bloc was correct, albeit for the wrong reasons.

In *Florida Prepaid* (the patents case), the situation differed sharply from that in *City of Boerne*. Here there was no effort to undo a past constitutional decision that was regarded as unacceptable on substantive grounds. Nor did the Patent Remedy Act[127] allow for any form of injunctive relief against the states

121. Employment Div. v. Smith, 494 U.S. 872 (1990).
122. *City of Boerne*, 521 U.S. at 520.
123. 527 U.S. 627 (1999).
124. 35 U.S.C. § 271(h) (1998).
125. 527 U.S. 666 (1999).
126. 15 U.S.C. § 1125 (1998).
127. 35 U.S.C. §§ 271(h), 296(a) (1998).

that would expand the scope of patent infringement law to cover other forms of conduct reserved to the state. The basic logic of incorporation thus provides that the question of sovereign immunity should be decided on the settled assumption that the Takings Clause now applies to the states. Once this is done, the distinction between torts and takings, which is part of the settled law, comes into play as well. But in this case, there was little question that the infringement was deliberate, so the overall case falls on the takings side of the line assuming all the other conditions for a taking were satisfied. The next question is whether a deliberate infringement should count as a taking, and on that issue the key decision is that of then-Justice Rehnquist in *Kaiser Aetna v. United States*,[128] which held that any compromise of the exclusive possession of a private marina was a taking even if the original owner was allowed to use it after the public was admitted. In principle it is long settled that patents count as property, and so long as the case involves government *use* rather than state *restrictions* imposed on private use, then *Florida Prepaid* looks just like *Kaiser Aetna*.[129] The two decisions could be distinguished on the ground that *Kaiser Aetna* opened the arena to the public at large, while *Florida Prepaid* allowed only government actors to infringe. But that distinction goes in principle only to the scope of the taking and the measure of damages, not to whether there has been any compromise of the exclusive right on the patent side.

Thus far the analysis shows a taking. But what about the question of just compensation? Chief Justice Rehnquist takes the position that the state could, in principle, provide a substitute remedy under state law. But the evidence was that such compensation was spotty at best[130] and sometimes depends, as in Florida, on filing a claims bill in the legislature, which is not, of course, a remedy as of right.[131] This sounds like a far cry from the "full equivalent of the property taken" standard that the Court adopted on these matters in *Monongahela Navigation Co. v. United States*.[132] But the exact difference between the various state remedies and the uniform federal constitutional standard should not matter once the defense of sovereign immunity, while not waived, has been displaced by the Fourteenth Amendment. The only adjustment that needs to be made is to bar double recovery under state law once the patent remedy has been taken, which is how matters work with respect to nonstate defendants. Unlike the situation in *Boerne*, this case presents no risk that the statutory remedy will be overinclusive, so the concerns about congruence and proportionality are fully satisfied by the statute as is. This decision at least seems far too protective of the states.

Florida Prepaid (the trademarks case) differs from the above analysis.

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128. 444 U.S. 164 (1979).

129. For an elaboration of this argument, see Richard A. Epstein, *The Constitutional Protection of Trade Secrets Under the Takings Clause*, 71 U. CHI. L. REV. 57 (2004).

130. *See Florida Prepaid*, 527 U.S. at 643-44.

131. *Id.* at 644.

132. 148 U.S. 312, 326 (1893).

Initially, the case gets off on the right foot because Justice Scalia held that the waiver in this case could not be extracted from the state by the old ploy of treating its decision to engage in interstate activities as a waiver of its immunity.[133] The first escape valve from sovereign immunity was closed, for if it were allowed in this case, then every statute would have exactly the same type of provision, making all waivers routine. The sovereign immunity analysis now turns on the shaky tort/takings distinction embedded in current Fifth Amendment law. A suit for false advertising (as opposed to one for trademark infringement) looks to be most closely analogous to state law claims for defamation, which have been held not to implicate a "property right" protected under the Fourteenth Amendment.[134] The key takings decisions of the Supreme Court were all designed to make sure that the Due Process Clause was not expanded so far that it became a "font of tort law."[135] Accepting the soundness of that judgment for this purpose, *Florida Prepaid* fell under *Seminole Tribe*'s rule that Congress cannot override state sovereign immunity solely by acting pursuant to its Article I, Section 8 powers.

The next pair of decisions, *Kimel v. Florida Board of Regents*[136] and *Board of Trustees v. Garrett*,[137] replay familiar themes with respect to the Age Discrimination in Employment Act (ADEA)[138] and the Americans with Disabilities Act (ADA) respectively.[139] Let me put aside, as I must, my fierce objections to both these statutes in any guise, to ask how the analysis plays out when both statutes are regarded as beyond reproach. Both cases involve statutes regulating matters that concern the internal affairs of the government, so that any due process/takings claims are out of the picture. What remains, therefore,

133. Coll. Sav. Bank v. Fla. Prepaid Post Secondary Educ. Expense Bd., 527 U.S. 666, 675-88 (1999), *overruling* Parden v. Terminal Ry., 377 U.S. 184 (1964). *Florida Prepaid* (the trademarks case) contains Justice Scalia's powerful denunciation of the doctrine of constructive waiver, which conditions the entry into interstate markets on the waiver of sovereign immunity. Note that his argument follows his earlier decision in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), dealing with individual rights. It also takes the same structure as the Court's oft-rebuked decision in *Hammer v. Dagenhart*, 247 U.S. 251 (1918), discussed in *supra* note 8, in which the right to remain outside of federal regulation was found not to be waived by selling goods out of state. For a defense of *Hammer* on these grounds, see RICHARD A. EPSTEIN, BARGAINING WITH THE STATE 147-49 (1993).

134. *Florida Prepaid*, 527 U.S. at 672-74.

135. *Id.* at 674 (citing Paul v. Davis, 424 U.S. 693, 701 (1976)). The decision offers no grounds on which the tort and takings are to be distinguished. Under *Paul*, loss of reputation was not a property interest. But the destruction of goodwill (itself transferable and descendible) normally does count as a property interest, at least under state law. The two are not easily distinguished. More generally, all torts involve the invasion of a property interest. In defamation, the misrepresentation interferes with the ability to dispose of capital or labor, or both. For my critique of *Paul*, see EPSTEIN, *supra* note 114, at 87-88.

136. 528 U.S. 62 (2000).

137. 531 U.S. 356 (2001).

138. 29 U.S.C. §§ 621-644 (2000).

139. 42 U.S.C. §§ 12101-12213 (2000).

in both cases is some version of the equal protection argument, which requires asking whether age and disability discrimination are evaluated under a strict scrutiny standard, a rational basis standard, or some standard in between. Justice O'Connor in *Kimel* and Chief Justice Rehnquist in *Garrett* were on firm ground in finding that the rational basis standard applied. They were therefore right to hold that the defense of sovereign immunity remained intact, given that it is (more than) rational for states to take into account the heavy costs in making accommodations for older workers or for workers with serious illnesses or chronic conditions. Relative to any narrow class of violations that states may have committed with respect to age or disability, these statutes require an overkill that flunks *Boerne*'s emphasis on congruence and proportionality.[140]

The situation is more complex when the ADA is applied to persons who are denied access to courts. In *Tennessee v. Lane*,[141] two paraplegics, one a litigant and the second a certified court reporter, sued under the ADA for being denied access to court facilities. A majority of the Court, including Justice O'Connor, held that the states were subject to suits under Section 5 of the Fourteenth Amendment for failing to provide access to courts, notwithstanding the earlier decision in *Garrett*. Chief Justice Rehnquist found no grounds of distinction between the two cases, and thus dissented on the grounds that *Garrett* controlled the current case.[142] A better approach, perhaps, is to split the difference. Some accommodation should be made for the criminal defendant who has no other option than to appear in court. In contrast, a court reporter doesn't have to hold that job or do that job in court (there are other venues), so the situation looks more like a straight (competitive) employment situation and less like a state monopoly control situation. The reporter's loss of business does not seem much different from the position of the state employees in *Garrett*. In truth, *Lane* just looks like a colossal piece of mismanagement. No one should be required to crawl up steps to defend himself. Don't build an elevator: just relocate that hearing.

Finally, *Nevada Department of Human Resources v. Hibbs*[143] deserves a frosty reception. Chief Justice Rehnquist, who wrote the majority opinion to which Justice O'Connor signed on, reached a poor result in holding that Section 5 authorized the application of the Family and Medical Leave Act (FMLA)[144] to government agencies.[145] The statute, which places a large crimp on freedom of contract, authorizes employees to take unpaid leaves of up to twelve weeks to care for family members. It contains no explicit distinction by way of sex but does rest on a stylized set of findings indicating that federal

140. *Garrett*, 531 U.S. at 368-69; *Kimel*, 528 U.S. at 83-86.

141. 541 U.S. 509 (2004).

142. *Id.* at 538 (Rehnquist, C.J., dissenting).

143. 538 U.S. 721 (2003).

144. 29 U.S.C. §§ 2601-2619 (2002).

145. Section 2617(a) contains a clear statement that the FMLA applies to state instrumentalities.

legislation is needed to rectify gender discrimination in this area. In dealing with leave policies generally, no one argues that they should be subject to a federal *ban*, but a mandate is a different matter altogether. The FMLA does not leave the employer indifferent to the leave granted, simply because no salary need be paid. Substitute workers have to be hired or staff reshuffled in ways that create extensive costs both at the initiation and termination of the leave, which are only compounded if more than one worker claims that option at any given time. The right approach is to leave that question to the contracting parties, who can best decide whether the leave works better than the termination alternative. The statute, which blocks these bargains, will surely have some adverse effects on hiring policies, job promotions, and overall wages.

Assume, however, that the FMLA is safe from constitutional review. The argument that it should apply to the states through Section 5 of the Fourteenth Amendment looks weak notwithstanding the stylized congressional findings to the contrary.[146] More women take advantage of these provisions[147] and would be expected to as well in voluntary transactions, given the greater female tendency to enter into nurturing and caring situations.[148] But this fact hardly reveals irrational behavior based on dubious "stereotypes."[149] Rather, it reflects the obvious point that in most rational family units, leave under any system will be taken by the worker for whom there are the fewest dislocations. It would be more accurate to say that, given the dominant forms of family specialization, it would be stronger evidence of sex discrimination to find an equal distribution of leave for men and women. After all, if more women than men leave the workforce to care for family members in the absence of regulation, then this ratio should hold if both sides are subsidized in equal amounts. The absence of any such shift suggests that this statute works even-handedly between the

146. *See Hibbs*, 538 U.S. at 729 n.2 ("Congress found that, 'due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men.'").

147. One study reports a slight decline in the sex differences between 1995 and 2000. The 1995 figures showed that 12.7% of men and 20% of women took family leave. The corresponding number was 13.5% for men and 19.8% for women in 2000. Jane Waldfogel, *Family and Medical Leave: Evidence from the 2000 Surveys*, 124 MONTHLY LAB. REV. 17, 21 (2001). That small shift need not be attributable to the FMLA but could be the result of a wide range of social practices. I am not aware of any study that seeks to isolate the various influences.

148. *See, e.g.*, DAVID C. GEARY, MALE, FEMALE: THE EVOLUTION OF HUMAN SEX DIFFERENCES (1998) (reporting greater male preference for objects relative to female preference for relationships); Judith E.O. Blakemore, *Children's Nurturant Interactions with Their Infant Siblings; An Exploration of Gender Differences and Maternal Socialization*, 22 SEX ROLES 43 (1990) (reporting greater female interest in caring relations). Note for the purpose of identifying difference in observed behaviors, the relative influence of biological or social influences is beside the point. No social science evidence is cited in *Hibbs*, save for congressional testimony.

149. *Hibbs*, 538 U.S. at 730.

groups in contrast with Title IX, which uses a mix of subsidies and penalties to increase the percentage of women relative to men in intercollegiate athletics. Furthermore, Chief Justice Rehnquist never asks whether the FMLA has shifted the distribution of leave between men and women or whether it has just increased leave overall. This comprehensive scheme goes far beyond any sense of proportionality and seems to flunk the sensible *Boerne* tests. *Hibbs* is especially regrettable because it falsely impugns the decency of countless public servants, none of whom are shown to have engaged in any form of invidious discrimination.

CONCLUSION

The purpose of this Article is to critique the key federalism decisions of Chief Justice Rehnquist and Justice O'Connor from the vantage point of someone who has never reconciled himself to the ostensible wisdom of the New Deal solution. From that perspective it is easy to be strongly critical of the Rehnquist/O'Connor position, especially insofar as it acknowledges and strengthens the Commerce Clause synthesis under *Wickard.* But even from that outside perspective, it remains crystal clear that there is more than a dime's worth of difference between the liberal and conservative blocs, which explains why fights over the recent Supreme Court nominee were so intense. Within the realm of the current judicial debate, whenever Chief Justice Rehnquist and Justice O'Connor part company with the Court's liberal bloc, I see no reason to side with the latter.

Yet my disquiet remains. Nothing can excuse Justice Brennan and others who write that *Wickard* is just a rerun of *Gibbons*. But I still disagree with Chief Justice Rehnquist's ingenious effort to cut back on unlimited federal jurisdiction without questioning *Wickard.* Prudentially, it may well be impossible to undo the mistakes of the New Deal. But even so, Chief Justice Rehnquist lost a vital opportunity by writing of *Wickard* as if it were an integral part of a continuous constitutional tradition. Battles over legitimacy count for a great deal, which is why Justice Brennan *never* conceded that *Wickard* was a break from the past. The entire subsequent debate, including the sorry performance of the Court in *Raich*, became easy so long as *Wickard* occupied the high judicial ground. That ongoing debate over congressional power takes on a very different form if the *illegitimate* doctrine in *Wickard* survives solely because of stare decisis and settled expectations. I understand not overruling *Wickard* (but would do otherwise). I do not comprehend endorsing its outcome.

Litigation over the Tenth Amendment and sovereign immunity highlights the key role of *systematic mistake* in constitutional interpretation. Once *Wickard* becomes law, then (virtually) all powers are delegated to the federal government, which creates enormous pressure against carving out areas in which state governments enjoy independence from any form of federal oversight. Protecting state independence post-*Wickard* is a tricky business. Yet

despite their timid performances in *Hibbs*, Chief Justice Rehnquist and Justice O'Connor have done solid work in insisting that dual sovereignty requires immunity from federal regulation. The torch has now passed. With the addition of Chief Justice Roberts and Justice Alito to the Court, let us hope that the good work of Chief Justice Rehnquist and Justice O'Connor will not be undone.